FILE COPY

Supreme Court, U. S.
FILED
AUG 20 1947
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 167

OLAF JORGENSEN,

Petitioner,

against

YORK ICE MACHINERY CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

EDWARD ASH,
DESMOND T. BARRY,
Counsel for Respondent.

INDEX

PAGE

STATEMENT 1

THE FACTS 1

ANSWERING POINTS

I—Trinka's interest or disinterest was for the jury's consideration and was not a matter of law 5

II—Defendant's counsel committed no prejudicial error during summation 5

III—The jury was not coerced, no undue influence was exerted upon them, and their verdict was a proper one 7

CONCLUSION—The petition for writ of certiorari should be denied 8

CASES CITED

Bennett v. Mazzaro, 144 Misc. 450, aff'd 237 A. D. 866 8

Broadway Bldg. Co. v. Saladino, 8 Misc. 73 7

Davis v. Lorenzo, Inc., 161 N. Y. S. 2d 624, 241 A. D. 782 7

Fabris v. General Food Corporation, 152 Fed. (2) 660 (C. C. A. 2) 8

Gambon v. City of New York, 153 Misc. 401 8

Gans v. Metropolitan St. Ry. Co., 84 N. Y. S. 918 7

McHugh v. Jones, 258 A. D. 111, aff'd 29 N. Y. S. 2d 76 7

Payne v. Bruese, 260 N. Y. S. 270, 236 A. D. 527; motion denied 262 N. Y. 630 7

Supreme Court of the United States

OCTOBER TERM, 1946

No.

OLAF JORGENSEN,

Petitioner,

against

YORK ICE MACHINERY CORPORATION,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

This is a petition by plaintiff, Olaf Jorgensen, for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, which unanimously affirmed (with opinion written by Hon. Learned Hand, 160 Fed. (2nd) 432) a judgment of the United States District Court, Eastern District of New York, in favor of defendant-respondent, which was entered on a verdict in said respondent's favor, after a trial before Inch., D. J., and a jury. An order of the aforesaid Circuit Court of Appeals, which affirmed an order of the Trial Court denying plaintiff's motion to set aside the verdict, is also sought to be reviewed.

The Facts

Jorgensen, the plaintiff, who is the petitioner here, claimed that he was injured in the engine room of a United

States transport known as the "Rodman Butler" (ff. 214, 215).* An ice box and ice machine were being installed on that ship under the supervision and direction of the defendant, and plaintiff, a plumber employee of another contractor, was assisting in the work (ff. 46, 47). The ice box and machine were being installed by defendant's supervisor, Arthur Trinka (f. 47).

The ice box itself was being installed in the refrigerator room (f. 207); the ice machine was being installed in the engine room (ff. 172-173, 208). Both rooms are separate although adjacent to each other (Defendant's Exhibits G and H, f. 177).

It was plaintiff's contention that while he was in this engine room with Trinka, the latter let "freon" gas into the newly installed refrigerating system without first making proper tests to determine whether there were any leaks in the pipes which defendant installed; that the "freon" gas came in contact with the flame of plaintiff's open blow torch and broke down into its dangerous and injurious constituent gases, causing injury to plaintiff.

The defendant showed that firstly, it did not sweat these pipe joints which allegedly leaked. Plaintiff and his fellow employees of the Jakobsen ship yards had done this (ff. 48, 1690).

Secondly, defendant introduced plaintiff's signed statements into evidence to show that plaintiff had asserted that the accident happened in the ice box where he was testing for leaks (ff. 1710, 1714). Yet on the trial he asserted the accident happened in the engine room—a different room entirely.

In his deposition before trial, plaintiff admitted that he was testing for leaks (ff. 230, 238). On the trial, he denied this; he was only watching Trinka let the "freon" gas into the pipe system (ff. 224, 226, 248-249). The hospital record also shows that Jorgensen was testing for leaks.

---

* References are to folio numbers in transcript of record, unless otherwise noted.

Trinka, defendant's supervisor, unequivocally stated that the plaintiff was not even in the engine room while he was testing for leaks (f. 1260). Plaintiff had gone into the refrigeration or ice box room to test for leaks there (ff. 1247, 1248, 1265).

Although plaintiff testified that he, his helper and a York Ice employee, all ran up the ladder when the gas allegedly leaked (ff. 201-203, 250), Trinka, who says he was the only one in the engine room, kept right on working there (ff. 1224, 1247, 1250, 1252).

It seems clear that an issue was definitely created as to whether any accident ever occurred and also as to the place where the occurrence, if any, took place. The jury was entitled to believe that plaintiff, Olaf Jorgensen, was not in the engine room at all while Trinka was testing; that Trinka was alone; that nothing of any importance happened because Trinka kept on working, and there were no major leaks (f. 1252).

A great deal of technical proof was also introduced on both sides relative to the properties of "freon" gas and as to whether it would break down into its constituent gases and cause injury under the circumstances existing at the time of the purported incident. Plaintiff's experts contended that "freon" would break down into chlorine and phosgene gas under the existing conditions; defendant's expert contended that it would not and could not do so (ff. 335, 473, 531-632, 935-962, 1466-1529).

Proceeding beyond the accident issue, the jury may well have found that plaintiff suffered no injury at all. He claimed to have injured his left shoulder in this accident. He denied any accidents prior to the one in suit which happened on October 2, 1941. Yet it was proven that he sustained injury to this same shoulder on August 11, 1941, less than two months before (ff. 1718-1719). Jorgensen then admitted this prior shoulder injury, and tried to pass it off as a minor thing. But his attending physician unsuccessfully attempted to aspirate the bursa of this left shoulder with a needle and to inject novocaine to ease the pain (f. 1718).

Plaintiff also denied an accident in April of 1943. This, too, was proven by a hospital record and his compensation claim to the effect that he was overcome by gas while testing a refrigeration system for leaks (ff. 154-156).

Jorgensen claimed serious lung damage in the instant case. Yet all of hospital X-ray readings up to June, 1942, were negative (ff. 1145, 1150). The hospital records indicated that the condition could not have been caused by gas. His own physician, Dr. Truby, said that these X-rays merely showed changes due to chronic bronchitis (f. 1147), and he finally admitted that he didn't know if this accident or a later one caused it (f. 1150).

Jorgensen was not unfamiliar with the installation of pipes and equipment in connection with refrigeration. In fact, he had sweated the joints of the very pipes out of which the "freon" gas allegedly leaked (ff. 191, 192). He had observed other refrigerating systems tested before this incident (f. 170). He had worked upon one on this very ship and had seen it tested (f. 171). In his signed statement he asserted that he, too, was testing for leaks (f. 1715), although on the trial he stated that Trinka was doing the testing, and that he knew what Trinka was doing and he merely watched (f. 179). Both in his signed statements and on the trial, Jorgensen indicated that he was clearly aware of what would happen when "freon" gas came into contact with an open flame (ff. 183, 1715); it turned into chlorine gas. And Trinka's deposition revealed that he, too, had informed plaintiff of the nature and properties of "freon" (ff. 1700, 1702) and that Jorgensen told him that he knew about "freon", having handled it before (f. 1707).

ANSWERING POINTS

I

Trinka's interest or disinterest was for the jury's consideration and was not a matter of law.

Plaintiff's counsel contends that, as a matter of law, he was entitled to a charge that Trinka, defendant's chief lay witness, was an interested one in the same manner as the plaintiff. Defendant respectfully contends otherwise.

Defendant's witness and employee, Trinka, was never a party defendant to this lawsuit. Therefore, he was not and could not be an interested party as a matter of law. Since he was, however, an employee of the corporate defendant the jury was entitled to consider his testimony in the light of that relationship. They did so. Furthermore, since the accident was over three years old and Trinka had never been served as a defendant, the Statute of Limitations had run on any cause of action against him. This presents an additional reason why he could not possibly have been a witness financially interested in the outcome of this suit.

Finally, as the learned Circuit Court pointed out, it was in no sense the judge's duty to say how far the jury should credit or discredit Trinka. He was free to comment or refrain from comment on this issue as on any other portion of the evidence. And the exercise of his judicial discretion in withholding such comment furnishes no basis for a valid objection.

II

Defendant's counsel committed no prejudicial error during summation.

Much ado is made about the fact that, during the course of summation, defendant's counsel stated that plaintiff would have a claim against other parties and not the de-

fendant (f. 1583). Objection was made and sustained by the Court and the jury told to disregard it. Plaintiff now claims that defendant's counsel meant to refer to workmen's compensation and, therefore, plaintiff was prejudiced. The argument is specious.

First, defendant's counsel never expressly mentioned the word "compensation". Secondly, plaintiff's counsel himself asked plaintiff (f. 1034):

> "Q. Now, this last question: Were you ever in any other hospital? Did the United States Compensation Commission at Washington Street, New York, refer you to a place for an X-ray? A. Yes.
> Q. And you went? A. Yes."

No objection was made by defendant's counsel to this line of questioning. Any intelligent jury would clearly infer compensation from plaintiff's counsel's own interrogation. And he himself had opened the door by referring to compensation.

On recross-examination also, it was brought out, without objection, that plaintiff was claiming compensation for this incident (f. 1039).

Thirdly, the Court admonished the jury to disregard defendant's counsel's statement and we cannot assume that they disregarded the warning. Again no exception was taken by plaintiff's counsel and he in no way indicated that he was dissatisfied with the Court's admonition to the jury which he, in fact, had asked for.

Respondent has no quarrel with the New York cases cited by petitioner. However they can have no application here. In each and every one of the cited cases, defendant's counsel was the one who attempted to introduce evidence of compensation. Whereas in the case at bar, plaintiff's own trial counsel opened up the subject.

Plaintiff's counsel's effort to assert prejudice because of an inference that plaintiff took compensation is both lame and belated. He expressly adverted to it in questioning his own client. And the error, if it was error, was therefore harmless and cured by the Court's ruling.

III

The jury was not coerced, no undue influence was exerted upon them, and their verdict was a proper one.

Plaintiff's counsel has submitted affidavits of jurors in an attempt to impeach their verdict. To put it quite mildly, this attempt to impeach the verdict is outrageous.

The law is clear, and it takes no citation to show, that a jury's deliberations and verdict are sacred and cannot be impeached. True, there can be no interference with their deliberations and no tampering therewith.

But what plaintiff's attorney seems to say here, oddly enough, is that the jurors coerced themselves. He does not and cannot contend that outside influence by way of fraud or duress was exerted upon them.

Defendant respectfully submits that the affidavits presented are incompetent to show any undue influence or duress to have been exerted upon this jury. Their deliberations are secret and in accord with their consciences and good judgment. We cannot presume that their deliberations were anything other than proper.

The law is definite and certain that affidavits and evidence of jurors are not admissible to impeach their verdict.

> *Payne* v. *Bruese*, 260 N. Y. S. 270, 236 A. D. 527; motion denied 262 N. Y. 630.
>
> *Davis* v. *Lorenzo, Inc.*, 161 N. Y. S. 2d 624, 241 A. D. 782.
>
> *McHugh* v. *Jones*, 258 A. D. 111, aff'd 29 N. Y. S. 2d 76.

A fortiori, an affidavit made by another as to a juror's statement, is doubly inadmissible, being subject to the further objection that it is hearsay.

> *Gans* v. *Metropolitan St. Ry. Co.*, 84 N. Y. S. 918.
> *Broadway Bldg. Co.* v. *Saladino*, 8 Misc. 73.

Bennett v. *Mazzaro,* 144 Misc. 450, aff'd 237 A. D. 866.

Gambon v. *City of New York,* 153 Misc. 401.

Even if we do consider these affidavits, however, they show nothing more than that the minority of the jurors eventually agreed to abide by the majority vote in favor of defendant. Such an agreement has been held not to warrant the setting aside of the verdict.

Fabris v. *General Food Corporation,* 152 Fed. (2) 660 (C. C. A. 2).

Both the trial judge and the Circuit Court of Appeals had ample opportunity to consider this same application below. They did so and exercised their sound discretion in denying the motion to set the verdict aside. It is respectfully submitted that the verdict and judgment entered thereon in the District Court and the affirmance thereof by the Circuit Court of Appeals for the Second Circuit are correct and that the petition for certiorari be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

Edward Ash,
Desmond T. Barry,
Counsel for Respondent.